99TH CONGRESS
2d Session

SENATE

TREATY DOC.
99-15

INVESTMENT TREATY WITH SENEGAL

NEWARK PUBLIC LIBRARY

APR 25 1986

U. S. GOVT. PUBS.
DEPOSITORY 375

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF SENEGAL CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT, WITH PROTOCOL, SIGNED AT WASHINGTON, DECEMBER 6, 1983

MARCH 25, 1986.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

71-118 O WASHINGTON : 1986

41.1/4:

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *March 5, 1986.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the United States of America and the Republic of Senegal concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed December 6, 1983, at Washington. I transmit also, for the information of the Senate, the report of the Department of State with respect to this treaty.

This treaty is among the first six treaties to be transmitted to the Senate under the Bilateral Investment Treaty (BIT) program that I initiated in 1981. The BIT program is designed to encourage and protect U.S. investment in developing countries. The treaty is an integral part of U.S. efforts to encourage Senegal and other governments to adopt macroeconomic and structural policies that will promote economic growth. It is also fully consistent with U.S. policy toward international investment. That policy holds that an open international investment system in which participants respond to market forces provides the best and most efficient mechanism to promote global economic development. A specific tenet, reflected in this treaty, is that U.S. direct investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment. Under this treaty, the parties also agree to international law standards for expropriation and compensation; free financial transfers; and procedures, including international arbitration, for the settlement of investment disputes.

I recommend that the Senate consider this treaty as soon as possible, and give its advice and consent to ratification of the treaty, with protocol, at an early date.

RONALD REAGAN.

READEX FICHE

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, February 20, 1986.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty between the United States and the Republic of Senegal concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed at Washington, December 6, 1983. This treaty is among the first six treaties to be negotiated under the bilateral investment treaty (BIT) program which you initiated in 1981. Development of the BIT program and the negotiation of the individual treaties have been pursued by the Office of the United States Trade Representative and the Department of State with the active participation of the Department of Commerce and the U.S. Treasury, in conjunction with other interested U.S. Government agencies. I recommend that this treaty, as well as the others concluded with the Kingdom of Morocco, the Republic of Haiti, the Republic of Panama, the Republic of Turkey, and the Republic of Zaire, be transmitted to the Senate for its advice and consent to ratification.

In 1981 you initiated the global bilateral investment treaty (BIT) program to encourage and protect U.S. investment in developing countries. By providing certain mutual guarantees and protections, a BIT creates a more stable and predictable legal framework for foreign investors in each of the treaty Parties. The negotiation of a series of bilateral treaties with interested countries establishes greater international discipline in the investment area.

The six treaties which have been signed as well as others under negotiation are an integral part of U.S. efforts to encourage other governments to adopt macroeconomic and structural policies that will promote economic growth. They are also fully consistent with your policy statement on international investment of September 9, 1983, which states that international direct investment flows should be determined by private market forces and should receive fair, equitable and non-discriminatory treatment.

Our experience to date has shown that interested countries are willing to provide U.S. investors with significant investment guarantees and assurances as a way of inducing additional foreign investment. It is our policy to advise potential treaty partners that conclusion of a BIT with the United States is an important and favorable factor in the investment relationship, but does not in and of itself result in immediate increases in U.S. investment flows.

Congressional support for the BIT program is reflected in Section 601 (a) and (b) of the Foreign Assistance Act, as amended, in particular at Section 601(b) which provides:

> In order to encourage and facilitate participation by private enterprise to the maximum extent practicable in achieving any of the purposes of this Act, the President shall . . . (3) accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to, and its equitable investment in, friendly countries and areas participating in programs under this Act.

BITs are consistent in purpose with the network of treaties of Friendship, Commerce and Navigation (FCNs) which the United States negotiated from the early years of the Republic until the last successful negotiations with Thailand and Togo in the late 1960s. They continue the U.S. policy of securing by agreement standards of equitable treatment and protection of U.S. citizens carrying on business abroad, and institutionalizing processes for the settlement of disputes between investors and host countries, and between governments. We expect that a series of bilateral treaties with interested countries will establish greater international discipline in the investment area.

The BIT was designed to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct private investment. In pursuit of this objective, the model BIT adopts FCN language and concepts. Traditional FCN provisions granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language concerning investment protection. Perhaps most significantly, the BIT goes beyond the traditional FCN to provide investor-host country arbitration in instances where an investment dispute arises.

Our BIT approach followed similar programs that had been undertaken with considerable success by a number of European countries, including the Federal Republic of Germany and the United Kingdom, since the early 1960s. Indeed, our industrialized partners already have nearly two hundred BITs in force, primarily with developing countries. Our treaties, which draw upon language used in the U.S. FCN treaties as well as European counterparts, are more comprehensive and far-reaching than European BITs.

THE UNITED STATES-SENEGALESE TREATY

The treaty with Senegal was negotiated by an interagency team led by officials from the Office of the United States Trade Representative and the Department of State. The treaty satisfies all four main BIT objectives:

—foreign investors are to be accorded treatment in accordance with international law and are to be treated no less favorably than investors of the host country and no less favorably than investors of third countries, whichever is the most favorable

treatment, ("national" and "most-favored-nation" treatment) subject to certain specified exceptions.

—international law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation;

—free transfers shall be afforded to funds associated with an investment into and out of the host country; and

—procedures are to be established which allow an investor to take a dispute with a Party directly to binding third-party arbitration.

The provisions on treatment of foreign investment and arbitration, and in particular Senegal's acceptance of international law as the governing law, mark an important achievement for the BIT program and our investment and international arbitration policies.

A technical memorandum explaining in detail the provisions of this treaty will be transmitted separately to the Senate Committee on Foreign Relations. That technical memorandum explains, clause by clause, the provisions of the treaty with Senegal.

Some provisions of the treaty with Senegal differ in minor respects from the U.S. model text. In general, however, the treaty closely follows the language contained in the U.S. model text, the most significant provisions of which are as follows.

The model BIT's definition section clarifies terms such as "company of a Party" and "investment." The BIT concept of "investment" is broad and designed to be flexible; although numerous types of economic interests are enumerated, the intent is to include all legitimate interests in the territory of either Party, whether directly or indirectly controlled by nationals of the other, having economic value or "associated" with an investment. Protected "companies of a Party" are those incorporated or othewise organized under the laws of a Party in which nationals of that Party have a substantial interest.

The model BIT accords the better of national or most-favored-nation (MFN) treatment to foreign investment, subject to each Party's exceptions which are listed in a separate Annex. The exceptions are designed to protect state regulatory interests and for the United States to accommodate the derogations from national treatment in state or federal law relating to such areas as air transport, shipping, banking, telecommunications, energy and power production, insurance, and from national and MFN treatment in the case of ownership of real property. Any future exceptions to these standards which a Party adopts are not to affect existing investments. The BIT also includes general treatment protections designed to be a guide to interpretation and application of the treaty. Thus, the Parties agree to accord investments "fair and equitable treatment" and "full protection and security" in no case "less than that required by international law." It specifically grants nationals of a Party the right to establish investments in the territory of the other Party, restricts the right to impose performance requirements, and obliges Parties to observe their contractual obligations with investors. The U.S. model also provides that nationals and companies of either Party shall in the territory of the other Party be permitted to employ professional, technical and managerial personnel of their choice regardless of nationality.

The model BIT also confers protection from unlawful interference of property interests and assures compensation in accordance with international law standards. It provides that any direct or indirect taking must be: for a public purpose; nondiscriminatory; accompanied by the payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general standards of treatment discussed above. The BIT's definition of "expropriation" is broad and flexibile; essentially "any measure" regardless of form, which has the *effect* of depriving an investor of his management, control or economic value in a project can constitute expropriation requiring compensation equal to the "fair market value." Such compensation, which "shall not reflect any reduction in such fair market value due to . . . the expropriatory action," must be "without delay," "effectively realizable," "freely transferable" and "bear current interest from the date of the expropriation at a rate equal to current international rates." The BIT grants the right to "prompt review" by the relevant judicial or administrative authorities in order to determine whether the compensation offered is consistent with these principles. It also extends national and MFN treatment to investors in cases of loss due to war or other civil disturbance. The BIT does not provide, however, a specific valuation method of compensating such losses.

The model BIT provides for free transfers "related to an investment," specifically of returns, compensation for expropriation, contract payments, proceeds from sale, and contributions to capital for maintenance or development of an investment. Such transfers are to be made in a "freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred." The model text recognizes that notwithstanding this guarantee Parties can maintain certain laws and regulations regarding transfers provided these are applied in non-discriminatory fashion. In particular, the model BIT provides that Parties can require reports of currency transfers and impose income taxes by such means as a withholding tax on dividends.

The model BIT provides that where certain defined investment disputes arise between a Party and a national or company of the other Party, including disputes as to the interpretation of an investment agreement, and the dispute cannot be solved through negotiation, it may be submitted to arbitration in accordance with any dispute-settlement procedures to which the national or company and the host country have previously agreed. Unless the national or company has submitted the dispute to previously agreed dispute settlement procedures or to adjudication by domestic courts or other tribunals of the host country, the national or company may submit the dispute to the International Centre for the Settlement of Investment Disputes ("ICSID"). Exhaustion of local remedies is not required. In a separate provision, the BIT Parties also agree to grant nationals and companies of the other Party access to their domestic courts in order to assert claims and enforces rights with respect to investments.

The model BIT provides for state-to-state arbitration between the Parties in case of a dispute regarding the interpretation or application of the treaty. In the absence of an agreement that other rules

apply, the BIT refers the Parties to specific procedural rules which must govern the arbitration. The BIT also outlines the procedures for the creation of the arbitral panel.

The model BIT exhorts Parties to apply their tax policies fairly and equitably. Because the United States specifically addresses tax matters in tax treaties, the BIT generally excludes such matters. It also specifically limits the arbitration provisions to only certain taxation matters. Another BIT provision exempts disputes arising under Export-Import Bank programs or other credit, guarantee or insurance arrangements providing for alternative dispute settlement arrangements, from the standard BIT arbitration clauses. The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests. The model BIT enters into force 30 days after exchange of ratifications and continues in force for at least ten years. Thereafter, either Party may terminate the treaty, subject to one year's written notice.

Each of these model provisions was developed after lengthy and extensive consultations within the U.S. Government and with the private sector. Nonetheless, in negotiating a particular treaty, the U.S. Government retains, of course, some flexibility to adopt modifications as necessary and in light of experience. While the U.S. model text has recently been simplified, the provisions summarized above have all been retained.

Some provisions of the treaty with Senegal differ in minor respects from the U.S. model text. The more significant of these are as follows:

(1) *Employment.*—The model text's subparagraph on employment has been broken out into a new paragraph (Article II, paragraph 6) to separate that topic from "entry and sojourn". Two Protocol paragraphs with respect to employment have been included in the Protocol (paragraphs 1 and 2) which (1) make clear that employment rights do not confer rights to entry or sojourn except as provided by national law; and (2) recognize that employment by U.S. companies or nationals in Senegal of Senegalese nationals whose qualifications are equal or superior to those of other applicants would contribute to the economic and social development objectives of Senegal. These modifications in no way restrict the investors' right to hire managerial, technical and professional personnel of their choice.

(2) *Performance requirements.*—Paragraph 3 of the Protocol recognizes that local purchase of goods and services can contribute to the economic objectives of the parties where such goods and services are available under equal or better conditions of price, quality and delivery time as compared to competitive goods and services, and where such purchase is otherwise consistent with the requirements of economic efficiency. This assertion does not detract from the treaty's prohibition against performance requirements.

(3) *Compensation upon expropriation.*—Paragraph 4 of the Protocol to the Senegal treaty defines "without delay" so as to permit "prompt completion of all necessary formalities." A "commercially reasonable rate" of interest for Senegal is defined as the discount rate established by the Central Bank of West African States. Nei-

ther definition represents a departure from international law standards of compensation for expropriation.

(4) *Consultation.*—A paragraph (Article VI, paragraph 3) has been added calling for biennial consultations between the Parties concerning the status and application of the treaty.

(5) *Settlement of disputes between an investor and a Party.*—Paragraph 5 in the Protocol states that if such a dispute arises when a Party is no longer an ICSID member, the Additional Facility of ICSID shall be used. The additional Facility does not require that Governments party to a dispute be ICSID members. The United States has supported the Additional Facility as an acceptable alternative in such cases.

(6) *Amendments.*—Although the U.S. model text contains no provisions for amendment, at Senegal's request, the treaty contains a paragraph (Article XIII, paragraph 3) which provides for amendment by agreement of the parties.

(7) *Exemptions from coverage.*—In the Annex to the treaty Senegal exempts from coverage small- and medium-sized enterprises as specified under its local law.

None of these modifications from the U.S. model text represent substantive departures from U.S. objectives.

Submission of this treaty, together with the other five noted above, marks a significant development in our international investment policy. I join with the United States Trade Representative and other U.S. Government agencies in supporting these treaties and favor their approval by the Senate at an early date.

Respectfully submitted,

GEORGE P. SHULTZ.

Treaty Between the United States of America and The Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment

The United States of America and The Republic of Senegal (each hereinafter referred to as a "Party"),

Desiring to promote greater economic cooperation between them, particularly with respect to investment by nationals and companies of one Party in the territory of the other Party, and

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of both Parties, and

Agreeing that discrimination on the basis of nationality by either Party against investment in its territory by nationals or companies of the other Party is not consistent with either a stable framework for investment or a maximum effective utilization of economic resources,

Have resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment, and

Have agreed as follows:

Article I

DEFINITIONS

For the purposes of this Treaty:

(a) "Company" means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.

(b) "Company of a Party" means a company duly incorporated, constituted, or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities

have a substantial interest as determined by such Party.

The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions.

Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty if nationals of any third country control such company, provided that, whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall promptly consult with the other Party to seek

a mutually satisfactory resolution of the matter. This right shall not apply with respect to recognition of juridical status and access to courts.

(c) "Investment" means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested.

Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

(d) "Own or control" means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located.

(e) "National" of a Party means a natural person who is a national of a Party under its applicable law.

(f) "Return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; and payment in kind.

Article II

TREATMENT OF INVESTMENT

1. Each Party shall endeavor to maintain a favorable environment for investments in its territory by nationals and companies of the other Party and shall permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies, and no less favorable than the treatment it accords in like situations to investments of nationals or companies of any third country.

2. Each Party shall accord existing or new investments in its territory of nationals or companies of the other Party, and associated activities, treatment no less favorable than that which it accords in like situations to investments and associated activities of its own nationals or companies, and no less favorable than that which it accords in like situations to investments and associated activities of nationals or companies of any third country. Associated activities include:

(a) the establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business;

(b) the organization of companies under applicable laws and regulations; the acquisition of companies or interests in companies or in their property; and the management, control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution or other disposition, of companies organized or acquired;

(c) the making, performance and enforcement of contracts;

(d) the acquisition (whether by purchase, lease or otherwise), ownership and disposition (whether by sale, testament or otherwise), of personal property of all kinds, both tangible and intangible;

(e) the leasing of real property appropriate for the conduct of business;

(f) the acquisition, maintenance and protection of copyrights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and

(g) the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

3. (a) Notwithstanding the preceding provisions of this Article, each Party reserves the right to maintain limited exceptions to the standard of treatment otherwise required if such exceptions fall within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party of all such exceptions at the time this Treaty enters into force. Moreover, each Party agrees to notify the other Party of any future exceptions falling within the sectors or matters listed in the Annex, and to maintain the number of such exceptions at a minimum. Other than with respect to ownership of real property, the treatment accorded pursuant to this subparagraph shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country. However, either Party may require that rights to engage in mining activities on the public domain shall be dependent on reciprocity.

(b) No exception introduced after the date of entry into force of this treaty shall apply to investments of nationals or companies of the other Party existing in that sector at the time the exception becomes effective.

4. Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any engagement it may have entered into with regard to investment of nationals or companies of the other Party.

5. (a) Nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, directing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

(b) The rights set forth in this paragraph shall be exercised in accordance with the requirements of the laws and regulations of the Parties relating to the entry and sojourn of aliens. The provisions of this paragraph shall be subject to the right of either Party to exclude or expel aliens on grounds related to the maintenance of public order, the protection of the public health, safety or morals, or national security.

6. Nationals and companies of either Party shall be permitted to engage, within the territory of the other Party, professional, technical and managerial personnel of their choice, regardless of nationality, for the particular purpose of rendering professional, technical and managerial assistance necessary for the planning and operation of investments. Companies which are incorporated, constituted, or otherwise organized under the applicable laws or regulations of one Party, and which are owned or controlled by nationals or companies of the other Party, shall be permitted to engage, within the territory of the first Party, top managerial personnel of their choice regardless of nationality.

7. The Parties recognize that, consistent with paragraphs 1 and 2 of this Article, conditions of competitive equality should be maintained where investments owned or controlled by a Party or its agencies or instrumentalities are in competition, within the territory of such Party, with privately owned or controlled investments of nationals or companies of the other Party.

8. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

9. In order to maintain a favorable environment for investments in its territory by nationals or companies of the other Party, each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties. Each Party shall grant to nationals or companies of the other Party, on terms and conditions no less favorable than those which it grants in like situations to its own nationals or companies, and no less favorable than those which it grants in like situations to nationals or companies of any third country, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, who otherwise qualify under applicable laws and regulations of the forum regardless of nationality, for the purpose of asserting claims, and enforcing rights, with respect to their investments.

10. Each Party shall make public by existing official means all laws, regulations, administrative practices and procedures, and ad-

judicatory decisions that pertain to or affect investments in its territory of nationals or companies of the other Party.

11. The treatment accorded by a Party to nationals or companies of the other Party under the provisions of paragraphs 1 and 2 of this Article shall in any State, Territory, possession, or political or administrative subdivision of the Party be the treatment accorded therein to companies incorporated, constituted or otherwise duly organized in other States, Territories, possessions, or political or administrative subdivisions of the Party.

ARTICLE III

COMPENSATION FOR EXPROPRIATION

1. No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or subjected to any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value), all such measures hereinafter referred to as "expropriation," unless the expropriation;

(a) is done for a public purpose;

(b) is accomplished under due process of law;

(c) is not discriminatory;

(d) does not violate any specific provision on contractual stability or any specific provision on expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriations; and

(e) is accompanied by prompt, adequate and effective compensation.

Compensation shall be equivalent to the fair market value of the expropriated investment. The calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice of announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action. Such compensation shall be paid without delay, shall be effectively realizable, shall bear current interest from the date of the expropriation at a commercially reasonable rate, and shall be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. If either Party expropriates the investment of any company duly incorporated, constituted or otherwise duly organized in its territory, and if nationals or companies of the other Party, directly or indirectly, own, hold or have other rights with respect to the equity of such company, the Party within whose territory the expropriation occurs shall ensure that such nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

3. Subject to the dispute settlement provisions of any applicable agreement, a national or company of either Party that asserts that all or part of its investment in the territory of the other Party has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of such other Party

to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefor, conforms to the provisions of the present Treaty.

ARTICLE IV

COMPENSATION FOR DAMAGES DUE TO WAR AND SIMILAR EVENTS

1. Nationals or companies of either Party whose investments in the territory of the other Party suffer

(a) damages due to war or other armed conflict between such other Party and a third country, or

(b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of terrorism in the territory of such other Party,

shall be accorded treatment no less favorable than that which such other Party accords to its own nationals or companies and no less favorable than that which it accords to nationals or companies of any third country in matters concerning restitution, indemnification, compensation or other appropriate settlement with respect to such damages.

2. In the event that such damages result from:

(a) a requisitioning of property by the other Party's forces or authorities, or

(b) destruction of property by the other Party's forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

the national or company shall be accorded restitution or compensation consistent with Article III.

3. The payment of any indemnification, compensation or other settlement pursuant to this Article shall be freely transferable.

ARTICLE V

TRANSFERS

1. Each Party shall permit all transfers related to an investment in its territory of a national or company of the other Party to be made freely and without delay into and out of its territory. Such transfers include the following: returns; compensation; payments made arising out of a dispute concerning an investment; payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; amounts to cover expenses relating to the management of the investment; royalties and other payments derived from licenses, franchises or other grants of rights or from administrative or technical assistance agreements, including management fees; proceeds from the sale of all or any part of an investment and from the partial or complete liquidation of the investment concerned, including any incremental value; additional contributions to capital necessary or appropriate for the maintenance or development of an investment.

2. To the extent that a nationnal or company of either Party has not made another arrangement with the appropriate authorities of the other Party in whose territory the investment of such national or company is situated, currency transfers made pursuant to para-

graph 1 of this Article shall be permitted in a currency or currencies to be selected by such national or company. However, transfer of the proceeds from a total or partial liquidation of an investment shall be permitted in any freely usable currency chosen by the Party receiving the investment. Except as provided in Article III, transfers made pursuant to paragraph 1 of this Article shall be made at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency or currencies to be transferred.

3. Notwithstanding the preceding paragraphs, either Party may maintain laws and regulations:

(a) prescribing procedures to be followed concerning transfers permitted by this Article, including verifications by the authorities responsible for the control of foreign exchange, provided that such procedures are carried out without delay by the Party concerned and do not impair the substance of the rights set forth in paragraphs 1 and 2 of this Article;

(b) requiring reports of currency transfer; and

(c) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminary and good faith application of its law.

ARTICLE VI

CONSULTATIONS AND EXCHANGE OF INFORMATION

1. The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty, including any matter or procedures, adjudicatory decisions, or policies of one Party that pertain to or affect investments of nationals or companies of the other Party.

2. If one Party requests in writing that the other Party supply information in its possession concerning investments in its territory by nationals or companies of the Party making the request, then the other Party shall, consistent with its applicable laws and regulations and with due regard for business confidentiality, endeavor to establish appropiate procedures and arrangements for the provision of any such information.

3. It is the intention of the two Parties to consult periodically about the status of this Treaty and its application. For this purpose, there will be consultations, at a time and place to be determined by mutual accord, between representatives of the two Parties every two years beginning from the date this Treaty enters into force.

ARTICLE VII

SETTLEMENT OF INVESTMENT DISPUTES BETWEEN ONE PARTY AND A NATIONAL OR COMPANY OF THE OTHER PARTY

1. For purposes of this Article, an investment dispute is defined as a dispute involving

(a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party;

(b) the interpretation or application of any investment authorization granted by the competent authority of a Party to such a national or company; or

(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. They may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third-party procedures, such as the fact-finding facility available under the Rules of the Additional Facility ("Additional Facility") of the International Centre for the Settlement of Investment Disputes ("Centre"). If the dispute cannot be resolved through consultation and negotiation, then it shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the parties have previously agreed. In the case of expropriation by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and relevant provisions of domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has subscribed.

3. (a) Each Party hereby consents to the submission of any dispute between such Party and a national or company of the other Party to the Centre for settlement by conciliation or binding arbitration if, at any time after six months from the date upon which the dispute arose:

(i) the dispute has not, for any reason, been submitted for settlement in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or other competent tribunals of the Party that is a party to the dispute.

If the national or company concerned consents in writing to the submission of the dispute to the Centre in the circumstances set forth above, either party to the dispute may institute proceedings before the Centre by addressing a request to this effect to the Secretariat of the Centre following the required procedures of Articles 28 and 36 of the Convention on the Settlement of Investment Dis-

putes between States and Nationals of Other States done at Washington March 18, 1965 ("the Convention"). If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention and the Regulations and Rules of the Centre.

4. A Party that is party to an investment dispute may not, at any stage of an arbitration or other dispute settlement procedure, raise as a defense the fact that the national or company that is the other party to the dispute has received or will receive, pursuant to an insurance contract, indemnification for all or part of its damages.

5. For the purposes of this Article, a company that is constituted or created by virtue of the law in force in the jurisdiction of one of the Parties but that, before the dispute arose, was owned or controlled by nationals or companies of the other Party, shall be treated as a national or company of such other Party.

6. The provisions of this Article shall not apply to a dispute arising:

(a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, or

(b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE VIII

SETTLEMENT OF DISPUTES BETWEEN THE PARTIES CONCERNING INTERPRETATION OR APPLICATION OF THIS TREATY

1. Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through diplomatic channels.

2. If the dispute between the Parties cannot be resolved through the aforesaid means, it shall be submitted at the request of either Party to an arbitral tribunal for binding decision.

3. The tribunal shall be established for each case as follows: Within two months of receipt of a request for arbitration, each Party shall designate a member of the tribunal. These two members shall then choose a national of a third state who, with the agreement of the two Parties, shall be appointed president of the tribunal. The president shall be appointed within two months of the date of the designation of the other two members.

4. If the appointments required by the paragraphs of this Article have not been made within the time specified, either of the Parties may, in the absence of any other agreement, request that the President of the International Court of Justice make the required appointments. If the President is a national of one of the Parties or if he is prevented for whatever reason from carrying out the aforesaid functions, the Vice President shall be asked to make the required appointments. If the Vice President is in the same situation, the next ranking member of the Court who is not a national of one of the Parties shall be asked to make the required appointments.

In the event that an arbitrator resigns or is for any reason unable to perform his duties, a replacement shall be appointed within thirty days, utilizing the same method by which the arbitrator being replaced was appointed.

5. The Parties may agree to specific arbitral procedures. In the absence of such agreement, the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission in 1958 ("Model Rules") and commended to Member States by the United Nations General Assembly in Resolution 1262 (XIII) shall govern. To the extent that procedural questions are not resolved by this Article or the Model Rules, they shall be resolved by the tribunal.

6. The tribunal shall take its decisions according to the provisions of this Treaty and of any other agreements between the Parties that are relevant and applicable, as well as according to the rules and principles of international law. It shall decide in all matters by majority vote. Any such decision shall be binding on both Parties. Each Party shall bear the expenses of its own representation in the course of the arbitration proceedings and of the arbitrator that it has selected. Expenses incurred by the president, and other costs of the proceeding, shall be paid for equally by the Parties. The tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties, and such a decision shall be binding on both Parties.

7. This Article shall not be applicable to a dispute that has been submitted to the Centre pursuant to Article VII(3). Recourse to the procedures set forth in this Article is not precluded, however, in the event that an award rendered in such a dispute is not honored by a Party, or an issue exists related to a dispute submitted to the Centre but not argued or decided in that proceeding.

8. The provisions of this Article shall not apply to a dispute arising:

(a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, or

(b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE IX

PRESERVATION OF RIGHTS

This Treaty shall not supersede, prejudice, or otherwise derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments, or associated activities, of na-

tionals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE X

MEASURES NOT PRECLUDED BY THIS TREATY

1. This Treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments in its territory of nationals and companies of the other Party, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE XI

TAXATION

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Articles VII and VIII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article V; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII (1)(a) or (b).

Matters covered by item 2(c) shall not be covered to the extent they are subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, unless such matters are raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XII

APPLICATION OF THIS TREATY TO POLITICAL SUBDIVISIONS OF THE PARTIES

This Treaty shall apply to political subdivisions of the Parties.

ARTICLE XIII

ENTRY INTO FORCE AND DURATION, AMENDMENT AND TERMINATION

1. This Treaty shall be ratified according to the appropriate constitutional procedures of each Party by each of the Parties, and the instruments of ratification thereof shall be exchanged as soon as possible.

2. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated

in accordance with Paragraph 4 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

3. Each Party may submit to the other in writing by diplomatic channels proposals for amendment. Any amendment will enter into force as soon as it has been agreed to by the two Parties.

4. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten-year period or at any time thereafter.

5. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington, on the sixth day of December, 1983 in the English and French languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

Robert E. Lighthizer
Deputy United States
Trade Representative

FOR THE GOVERNMENT OF THE REPUBLIC OF SENEGAL:

Moustapha Niasse
Minister of State for
Foreign Affairs

ANNEX

In accordance with Article II, paragraph 3, each Party reserves the right to maintain limited exceptions in the sectors it has indicated below:

For the United States of America

Air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real estate; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources.

For Senegal

Small and medium-sized enterprises specified in Law 81-51 of July 26, 1981.

PROTOCOL

The duly authorized Plenipotentiaries of the Parties have further agreed upon the following provisions, which shall form an integral part of the Treaty on the reciprocal encouragement and protection of investment, signed on this date.

1. The provisions of Article II (6) shall not be construed to confer any rights with respect to the entry and sojourn of persons in the territory of either Party, except as provided by national law.

2. Without prejudice to the rights set forth in Article II, paragraph 6, the Parties recognize that the employment of Senegalese nationals by nationals and companies of the United States maintaining investments within the territory of the Republic of Senegal, where the qualifications of such Senegalese nationals are equal or superior to those of other applicants for employment, would contribute to the economic and social development objectives of the Republic of Senegal.

3. Without prejudice to the obligations set forth in Article II, paragraph 8, the Parties recognize that the purchase of goods and services within the territory of the Party receiving the investment, where such goods and services are available in conditions of price, quality and delivery time equal or superior to those of competitive goods and services and where such purchase is otherwise consistent with the requirements of economic efficiency, can contribute to the economic objectives of the Parties.

4. Payment of compensation shall be considered to be made "without delay" in conformity with Article III(1) if adequate provision has been made prior to the date of the expropriation for the

determination and payment of such compensation and the compensation is paid within a period of time no longer than is necessary for the prompt completion of all necessary formalities. In the event of an expropriation by the Republic of Senegal, the discount rate established by the Central Bank of West African States during the period between the expropriation and the payment of compensation shall be considered to be a "commercially reasonable rate" of interest in conformity with Article III(1).

5. In the event that either Party is no longer a Party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or the facilities of the International Centre for the Settlement of Investment Disputes are for any other reason not available for the purposes set forth in Article VII(3), the Additional Facility shall be employed for such purposes.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed this Protocol.

DONE in duplicate at Washington, on the sixth day of December 1983, in the English and French languages, both texts being equally authentic.

Robert E. Lighthizer
Deputy United States
Trade Representative

Moustapha Niasse
Minister of State for
Foreign Affairs

○